

OFFICE OF THE ARMY GENERAL COUNSEL
FISCAL LAW COURSE

OBLIGATION OF APPROPRIATIONS

SECTION F

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OBLIGATION OF APPROPRIATIONS

I. CONSTITUTIONAL FOUNDATION

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law; and a regular Statement and Account of the Receipts and Expenditures of all Public Money shall be published from time to time. U.S. Constitution, Article 1, Section 9, Clause 7.

II. STATUTORY FOUNDATION: 31 U.S.C. § 1501

An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of

- (1) A binding agreement between an agency and another person (including an agency) that is
 - (a) in writing, in a way and form, and for a purpose authorized by law; and
 - (b) executed before the end of the period of availability for obligation of the appropriation of funds used for specific goods to be delivered, real property to be bought or leased, or work or service to be provided.

III. REGULATORY FOUNDATION

- A. DoD Manual 7220.9-M, chapters 24 and 25.
- B. AR 37-1, chapters 8 and 9.
- C. AFR 170-13 and 170-8.
- D. NGR 37-108.

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IV. COMMITMENT OF APPROPRIATIONS

A. Definition of Commitment

1. An administrative reservation of funds based upon firm procurement requests, orders, directives, and equivalent instruments (DoD Manual 7220.9-M, ch. 24, para. B(2)(a); AR 37-1, para. 8-1a; AFR 170-13, para. 3a).
2. Must be signed by a person authorized to reserve funds (DoD Manual 7220.9-M, ch. 24, para. B(2)(A)).
3. Shall be recorded in the accounting records and uncommitted/unobligated balances reduced (Id.).

B. General Rules

1. Required for all appropriations except merged accounts (AR 37-1, para. 8-1c).
2. Commitments in excess of available funds may violate Antideficiency Act, 31 U.S.C. § 1517 (Id., at para. 8-1b).

C. Commitment Documents Id., at para. 8-5)

1. DA Form 3953
2. AF Form 9
3. Purpose of commitment document Id., at para. 8-5b).
 - a. Starts procurement process.
 - b. Used by fund control officer to approve availability of funds and correctness of accounting classification.

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- c. Shows commitment of funds.
- d. Worksheet to record technical requirements information.
- e. Place to maintain obligation record.
- 4. Funds citations
 - a. Means of identifying funds for purpose of obligations.
 - b. Way that agencies keep track of funds.
 - c. Tells who is using money and what it's being used for.
- D. Commitment Accounting
 - 1. Amount of commitment (AR 37-1, para. 8-4b).
 - a. Based on procuring activity's estimate for goods, supplies, or services required to meet only bona fide needs of the period for which funds were appropriated.
 - b. Include estimated contingent liabilities.
 - c. Open-end contracts and option agreements must be recorded as a commitment only when the amount is reasonably firm.
 - 2. When Recorded
 - a. Date commitment document signed determines the accounting period in which commitment is recorded.

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- b. Cancel outstanding commitments as of the end of the period that the appropriation is available (AR 37-1, para. 8-4(a)(6); AFR 170-13, para. 5d).
- c. There can be no outstanding commitments in expired appropriation accounts.

V. OBLIGATION OF APPROPRIATIONS

- A. Definition (DoD Manual 7220.9-M, ch. 24, para. B(d); AR 37-1, para. 9-1a; AFR 170-8, para. 2a).
 - 1. Any act that legally binds the U.S. Government to make a payment.
 - 2. Must be supported by documentary evidence of the transaction (DoD Manual 7220.9-M, ch. 25, para. C(2); AFR 170-9, para. 4a; NGR 37-108, para. 3-1b); examples:
 - a. DD Form 1155 (Order for Supplies or Services).
 - b. SF 33 (Solicitation, Offer, and Award).
 - c. SF 30 (Amendment of Solicitation/Modification of Contract).
 - 3. Includes orders placed, contracts awarded, services received, and similar transactions during an accounting period that will require payment during the same or future accounting period.
- B. Purposes for Which Funds May Be Obligated
 - 1. Funds may be obligated only for the purposes for which they were appropriated (AR 37-1, para. 9-5a(1)).

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2. Contracts or orders for goods, supplies, or services must meet abona fide need for the period for which funds were appropriated, or replace stock used in that period (DoD Manual 7220.9-M, ch. 25, para. C(3)(a); AR 37-1, para. 9-5a(2); AFR 170-8, para. 4c).
3. Exceptions to bona fide need rule
 - a. Lead Time
 - (1) Performance in a future fiscal year may be a bona fide need of the current fiscal year if the normal production lead time would require procurement action in the current fiscal year to insure timely delivery.
 - (2) Contracts must be entered into with the intent that performance will begin without unnecessary delay (DoD Manual 7220.9-M, ch. 25, para. C(3)(b)).
 - b. Statutory exception for maintenance and repair projects (10 U.S.C. § 2410a; DoD Manual 7220.9-M, ch. 25, para. C(3)(c)).
 - (1) Must satisfy a bona fide need arising in the fiscal year of the appropriation.
 - (2) May award contract near end of fiscal year for performance to begin next fiscal year.
 - (3) Must include requirement that work begin before January 1.

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c. Replacement Contracts

- (1) Where contract terminated for default, funds cited in defaulted contract may be used for the replacement contract (DoD Manual 7220.9-M, ch. 25, para. C(3)(d)).
- (2) Replacement contract must be awarded without undue delay after termination.
- (3) Bona fide need must continue to exist.
- (4) Replacement contract must be awarded on the same basis and be substantially similar to the original contract in scope and size.

C. General Rules for Obligating Funds

1. Funds cannot be obligated in advance of appropriations and apportionment; a fund authorization document must be received prior to obligation.
2. If administrative lead time requires a contract to be awarded prior to receipt of funds to ensure timely delivery of goods and services, use "subject to availability of funds" clause.

D. Determining Time and Amount of Obligation

1. General Rule: obligate full amount of the legal liability of the United States.

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2. Determined by type of contract (AR 37-1, Table 9-1).
 - a. Firm fixed-price contracts.
 - (1) obligate contract price on date of contract award.
 - b. Fixed-price contracts with escalation, price redetermination, or incentive provisions.
 - (1) obligate the target or billing price on the date of contract award, even if the contract has a higher ceiling price;
 - (2) adjust obligation upward or downward on date contract is modified to reflect new price using the same funds;
 - (3) for upward adjustment in price, must obligate same funds as used in the original contract (DoD 7220.9-M, ch. 25, para. D(1)(d)).
 - (4) to avoid possible Antideficiency Act violation, must commit funds in amount of ceiling price (Secretary of Defense, 34 Comp. Gen. 418, 420-21 (1955)).
 - c. Cost reimbursement contracts (cost-plus-fixed-fee, award fee or incentive fee, time and materials contracts).
 - (1) obligate total estimated costs, including fixed, base or target fees.

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- (2) if ceiling price of contract is increased under the Limitation of Cost Clause, obligate additional funds to cover the new maximum liability of the government.
- (3) the additional funds must come from funds current at the time of the adjustment (Environmental Protection Agency, 61 Comp. Gen. 609, 612 (1982)).
- (4) when evidence indicates that costs will be less than originally estimated, must recover the excess funds; these excess funds may not be used in a succeeding fiscal year (Magnavox, B-207433, September 16, 1983)).
- d. Indefinite delivery-definite quantity contracts.
 - (1) obligate full amount of the definite quantity at time of award.
- e. Indefinite delivery-indefinite quantity contracts.
 - (1) obligate the stated minimum quantity at the time of award.
 - (2) obligate additional funds for each additional order at the time the order is issued.
- f. Requirements contracts.
 - (1) obligate the amount of each delivery order on the date issued.

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g. Letter contracts.

- (1) used only when no other contractual arrangement is possible to cover payments for work which must be commenced immediately, but prior to all the details having been agreed upon by the parties; the parties contemplate reaching agreement as to certain matters which will later be recorded in the definitized agreement which will supersede the letter contract.
- (2) agencies required to include a statement of the Government's maximum liability to assure that the contractor does not incur costs in excess of amounts available.
- (3) obligate current funds in the amount of the maximum liability authorized in the letter contract.
- (4) when the contract is definitized, adjust the obligated amount to equal the final amount, using funds currently available for obligation.
- (5) if both the letter contract and the definitized contract are entered into during one FY, the cost of both can be obligated against funds in that FY; however, when the letter contract is entered into in one FY and the definitized contract in the next FY, then obligate the amount of the letter contract from current FY funds; once the agreement is definitized, obligate

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funds from the next FY to fund the additional cost stated in the definitized contract.

- h. Purchase orders.
 - (1) obligate amount of purchase order.
 - (2) if unilateral (acceptance is evidenced by performance), obligate funds upon notice of acceptance or delivery.
 - (3) if bilateral, obligate on date of execution.
- i. Rental agreements and leases of real or personal property.
 - (1) obligate one month at a time throughout the term of the rental agreement.
 - (2) amount of obligation.
 - (a) if government may terminate without notice and without termination costs, obligate one month's rent each month.
 - (b) if the government may terminate without cost upon giving a specified number of days notice, obligate one month's rent plus the amount of rent for the number of days notice.
 - (c) if the government may terminate with a specified payment in the event of

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termination, obligate one month's rent plus the amount of the termination payment.

- (d) if there is no termination provision, obligate the full amount of the rental agreement, up to 12 months, even if the agreement extends into the next fiscal year.

j. Intra-government agreements.

- (1) Reimbursable procurement - if procurement ordered from another DoD agency or GSA where other DoD agency or GSA is to be reimbursed, obligate funds at time other DoD agency or GSA accepts the order in writing.
- (2) Direct citation - if procurement to be done by other DoD agency via contract showing separate prices and quantities with cites to ARNG funds, obligate funds at time of notification of award of the contract.
- (3) Orders required by law to be placed with another U.S. Government agency (Federal Prison Industries, Government Printing Office) - obligate funds at the time order is issued.
- (4) Project Order Law (41 U.S.C. § 23)
 - (a) provides that orders or contracts for work placed with Government-owned

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establishments shall be considered as obligations in the same manner as provided for orders or contracts placed with private contractors.

- (b) recorded as obligation when accepted in writing by the performing activity (DoD 7220.9-M, ch. 25, para. F(3)(a)).

- (5) Economy Act (31 U.S.C. § 1535).

- (a) provides that head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods and services.

- (b) record as obligation when accepted in writing (DoD 7220.9-M, ch. 25, para. F(3)(b)).

k. Stock Fund Orders

- (1) Obligation recorded when order placed; if the item does not have a stock number, the obligation is recorded when the stock fund accepts the order (DoD 7220.9-M, ch. 25, para. G(1)(b)).
- (2) Obligation cancelled when notified of unacceptable substitution, transfer of item to centrally-managed procurement appropriation, or stock fund's inability to

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perform (DoD 7220.9-M, ch. 25,
para. G(2)(a)).

- (3) Obligation for non-stock-numbered item expires if appropriation expires before stock fund has executed a procurement action Id., at para. G(3)).

3. Bona Fide Need Rule and Service Contracts

- a. Funds may only be used for abona fide need for the period during which funds are available.
- b. Funds certifying officer can be held liable for certifying wrong funds.
- c. Severable contracts for maintenance, services, or rental.
- (1) Severable services are continuing and recurring services, a specific portion of which are needed in a subsequent FY (Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases 65 Comp. Gen. 741, 743 (1986)).
- (2) Obligate funds current when contract signed for the amount necessary to fund the contract to the end of the period of availability of the funds (Obligations and Charges Under Small Business Administration Service Contract, 60 Comp. Gen. 219, 221-22 (1981)).

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(3) Exceptions - 10 U.S.C. § 2410a provides that funds shall be available for payments under contracts for any of the following purposes for 12 months beginning at anytime during the fiscal year:

- (a) maintenance of tools, equipment, and facilities.
- (b) lease of real or personal property, including maintenance when contracted as part of lease agreement.
- (c) depot maintenance.
- (d) operation of equipment.

d. Nonseverable service contracts.

- (1) Non-severable services are single undertakings with one identifiable end product; test is whether services will meet immediate need.
- (2) Obligate funds current when contract signed for the full amount of the contract.

E. Adjustment of Obligations

- 1. Obligations must be adjusted when changes in circumstances create differences between the original amount obligated and the current liability of the government.
- 2. Which fiscal year's funds can be used determined by relation-back theory - if the price adjustment is not the result of a new liability but is based on a fixed and certain

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amount of liability existing at the time the contract was executed, then funds current at the time the contract was executed may be used (Environmental Protection Agency 61 Comp. Gen. 609, 611 (1982)).

- a. Fixed-price contract changes pursuant to Changes Clause, FAR 52.243-1.
 - (1) Allows contracting officer to make changes within the general scope of the contract in (a) drawings, designs or specifications when supplies are being furnished in accordance with Government drawings, designs or specifications, (b) method of shipment or packing, and (c) place of delivery.
 - (2) Adjust obligation to reflect increase or decrease.
 - (3) Additional funds from fiscal year cited in original contract (DoD 7220.9-M, ch. 25, para. 11(a)).
- b. Cost-reimbursement contract changes.
 - (1) Where change does not require increase in ceiling price, use funds from fiscal year cited in original contract (61 Comp. Gen. at 611).
 - (2) Where change requires increase in ceiling price, obligate funds to cover the cost of change from funds available when change approved by contracting officer (Id., at 612).

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- c. Correction of mistakes and formalization of informal agreements (DoD 7220.9-M, ch. 25, para. 11(b)).
 - (1) Adjust obligation to reflect correct amount.
 - (2) Use funds from fiscal year cited in original contract.
 - (3) If adjustments result of change in scope of contract or are a new procurement, use funds current at time of adjustment.
- d. Contingent liabilities - indemnification clause or equitable adjustment clause.
 - (1) Use funds from fiscal year cited in original contract.
- e. Changes outside scope of original contract- such as increase in quantity.
 - (1) Use funds from fiscal year current at time change is directed.
- f. Claims (AR 37-1, Table 9-9).
 - (1) If within the scope of contract, use funds from fiscal year cited in original contract.
 - (2) If outside scope of contract, use funds from fiscal year current when change giving rise to the claim occurred.

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- g. Incrementally funded contracts.
 - (1) Use funds current when contract enters into each new fiscal year.

F. Terminated Contracts

1. Termination for Convenience.

- a. Recover all funds in excess of the estimated termination settlement costs (DoD Manual 7220.9-M, ch. 25, para. 12; AR 37-1, Table 9-9).
- b. Funds not available for reprocurement unless termination was the result of a:

- (1) Court order;
- (2) Determination by a contracting officer that the award was improper;
- (3) Determination by other authority (GAO, BCA) that the award was improper.

(DoD Comptroller Memorandum, 27 January 1992, SUBJECT: Contract Defaults Resulting in Reprocurement Contract Actions).

2. Termination for Default.

- a. Funds obligated under original contract remain available for a reprocurement contract even if their period of availability has expired, but only if:
 - (1) The replacement contract is awarded without undue delay;

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- (2) There is still a bona fide need for the goods or services;
- (3) The replacement contract is awarded on the same basis as the original contract, except for the total cost;
- (4) The replacement contract is substantially similar to the defaulted contract in nature, size, and scope.

(Funding of Replacement Contracts 60 Comp. Gen. 591, 592-93 (1981)).

- b. Excess costs must be funded by current appropriations.
 - c. Funds recovered from the defaulted contractor as excess reprocurement costs are returned to the account of the original contract for use in the reprocurement (Army Corps of Engineers 65 Comp. Gen. 838, 841-42 (1986); Bureau of Prisons, 62 Comp. Gen. 678, 682 (1983)).
3. Termination for default converted to termination for convenience.
- a. If replacement contract already awarded using the original contract's funds, no corrective action required Id., 60 Comp. Gen. at 594).
 - b. If conversion is on appeal and replacement contract has not already been awarded using original contract's funds, the original contract's funds are

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no longer available for obligation; must
use current FY funds for replacement
contract (Id.).

G. Contract Litigation

1. Settlements - use funds from fiscal year originally cited in the contract.
2. Judgments - paid from judgment fund (31 U.S.C. § 1304).
 - a. Agencies reimburse from funds available at the time of entry of judgment Bureau of Land Management, 63 Comp. Gen. 308 (1984)).
3. Costs of litigation - costs, such as deposition transcripts and expert witness fees, are paid from funds available at the time the service or supply is needed.

H. Ratification of Actions Without Formal Contract.

1. Use funds available at the time that services were performed or supplies delivered and accepted (Fish and Wildlife Service B-208730, January 6, 1983; Selective Service System, B-205415, March 19, 1982.)

I. Liquidated Damages.

1. Reduce obligations by amount of liquidated damages withheld from contractor.
 - a. If contractor objects to assessment, commit the amount of liquidated damages recovered; reobligate amount of liquidated damages if assessment is sustained (AR 37-1, Table 9-9).

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2. May be used to fund replacement contract
(National Park Service 64 Comp. Gen. 625
(1985)).
- J. Service Contracts Extended Beyond End of Fiscal
Year
1. Rules for use of option contracts.
 - a. Exercise of option cannot be automatic.
 - b. Need determination that the option is
the most advantageous means of filling
the requirement.
 - c. Contract must have a subject to
availability of funds clause (FAR
52.232-18).
 - d. Obligate funds for each option period
after funds become available.
 2. Requirements or indefinite quantity
contracts.
 - a. Must have subject to availability of
funds clause (FAR 52.232-19).
 - b. For each order use current year funds.

VI. CONCLUSION

- A. COMMITMENT
- B. OBLIGATIONS
- C. ANTIDEFICIENCY ACT

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- D. BONA FIDE NEEDS RULE
- E. TIME AND AMOUNT OF OBLIGATION DETERMINED BY TYPE
OF CONTRACT
- F. ADJUSTMENT OF OBLIGATIONS